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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JACK DUCKWORTH,
Warden, and
LINLEY E. PEARSON
Attorney General of Indiana,

Petitioners,

vs.

WILLIAM L. COWELL,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, WILLIAM L. COWELL, respectfully prays this Court to deny to issue a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in Cause Number 81-1780 on September 18, 1981, which affirmed the judgment of the United States District Court for the Northern District of Indiana, South Bend Division.

FACTS MATERIAL TO CONSIDERATION OF THE QUESTION PRESENTED

Respondent would add the following to the facts presented by Petitioners.

At the post-conviction hearing Respondent, WILLIAM COWELL, denied having killed the decedent and testified that he admitted to it only to protect his then wife, CHARLOTTE SIEBERT, and because he had been led by her to believe he would receive a light sentence. (PCR 106, 121).

The indication that WILLIAM COWELL, by admitting the shooting, receive a light sentence, was prompted by letters from CHARLOTTE SIEBERT to WILLIAM COWELL. (PCR 108, 109). Two (2) of these letters were shown to his trial counsel during the trial. (PCR 109).

Respondent, WILLIAM COWELL, also indicated during the post conviction hearing that during the trial the jury was never made aware of any deals between his then wife, CHARLOTTE SIEBERT, and her relatives in exchange for their testimony on behalf of the State. (PCR 116, 117). Respondent also indicated that he was never made aware of any deals between CHARLOTTE SIEBERT and the State and was not aware that she would be testifying for the State until the trial started. (PCR 114, 116).

REASONS FOR DENYING THE WRIT

The Seventh Circuit Has Decided Correctly And In A Way Not In Conflict With Controlling Decisions Of This Court That Dual Representation By An Attorney Of A Defendant And A Prosecution Witness Is A Per Se Violation Of The Sixth Amendment.

ARGUMENT

The Seventh Circuit did hold that without an informed consent by a defendant, dual representation by an attorney of that defendant and a prosecution witness is a per se violation of such defendant's Sixth Amendment rights.

This opinion of the Seventh Circuit is in no way conflicting with the recent decisions of this Court.

Petitioners' first cites *Cuyler v. Sullivan,* U.S., 100 S.Ct. 1708 (1980). The Cuyler case involves joint representation of co-defendants. This Court noted in that decision that joint representation of co-defendants is often advantageous to both defendants. Hence, very often there would be no conflict whatsoever. Hence, this Court held in *Cuyler,* that:

> ...absent special circumstances, therefore, trial courts may assume either that multiple representation entails no conflict or that the lawyer and his clients knowingly accept such risk of conflict as may exist. *Cuyler v. Sullivan, supra,* 100 S.Ct. at 1717.

The case now before the Court involves dual representation of a defendant and two (2) of the prosecution witnesses. Clearly, a different issue than was before the Court in *Cuyler.*

While one can assume that joint representation of co-defendants is known to all parties and not a conflict, the same assumption can not be made with a defendant and prosecution witnesses.

Hence, the factual situation is so different that the ruling of the Seventh Circuit clearly does not conflict with the ruling in *Cuyler v. Sullivan, supra.*

The other case cited by Petitioners as conflicting is *Wood v. Georgia,* U.S. 101 S.Ct. 1097 (1981). This case also had a significantly different fact situation than the one now before the Court. In *Wood v. Georgia, supra,* we had a situation where an employer paid attorney fees for employees arrested in his establishment.

Because of a possible conflict of interest, this Court remanded for a determination as to whether an acutal conflict of interest occurred.

Clearly, in *Wood v. Georgia, supra,* there may well have been no conflict, and hence, a determination need to be made as to whether one existed. The significantly different factual situation means that the ruling of the Seventh Circuit is not in conflict with this Court's decision in *Wood vs. Georgia, supra.*

In both of the cited cases we can see that the dual representation would, not only not always cause a conflict, but would, in fact, very often be advantageous to all parties.

This is quite unlike the situation confronted by the Seventh Circuit; where dual representation of a defendant and two (2) prosecution witnesses is unknown and not consented to by the defendant can never exist without conflict. There would always be a conflict between the defendant being tried and the witnesses called by the State to convict the defendant. This is especially true, where as here, the common attorney made various deals for the witnesses when their testimony was traded for their not being charged and prosecuted.

The opinion of the Seventh Circuit is clearly not in conflict with either *Cuyler* or *Wood,* and is in fact, proper and hence a writ of certiorari should not be allowed.

CONCLUSION

For these reasons, the Petition for Writ of Certiorari to review the judgment and order of the Seventh Circuit should be denied.

Respectfully submitted,

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